No. 16,117

In the

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SEBASTOPOL APPLE GROWERS UNION,
Respondent.

Brief for Respondent and Request for Prehearing Conference Under Rule 35 (11)

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INTRODUCTION

In 1954 the Teamsters were trying to organize the employees of respondent Sebastopol Apple Growers Union, a cooperative which packs, cans and ships apples and apple products (R. 17). Respondent is known as SAGU for short, and we will sometimes use that abbreviation in this brief. The events giving rise to this action took place in the fall of that year.

In the summer and fall of 1955 hearings were held before a Trial Examiner of the Board (R. 17). By the time he issued his report in March 1956 (R. 173), the union and respondent had settled their dispute and reached a fair agreement. They joined in a request to withdraw the charge

(R. 185-189). The Board denied the request summarily (R. 189-190): the matter was not dropped.

More time passed. In August 1957, almost a year and a half after the Trial Examiner's report, the Board adopted his findings, conclusions and recommendations, again without analysis or discussion (R. 198). Finally, another year later, the Board petitioned for enforcement (R. 206-208).

Now, almost five years after the events in question, almost four years since the matter came before the Board, and over three years since it has been settled by the parties, this Court is given the task of reviewing the 1300-plus-page record to determine whether the Board's order is supported by substantial evidence. We shall endeavor to be as helpful as possible to the Court in this task.

The mills of the Board grind slowly; how fine they grind remains to be seen.

One question may occur to the Court at the outset: if the respondent and the union have settled this matter, why should respondent object to the Board's order? Primarily because it calls for back pay for 146 people (R. 200, 181-183), none of whom, as we will show, were discriminatorily discharged and many of whom were not discharged at all. Furthermore, respondent does not want to be put into a position of acknowledging unfair labor practices which it did not commit.

The real question is why the Board did not dismiss the matter after the settlement had been reached in 1956. This is one of the principal issues which we will discuss, and we will show that the Board's refusal was unreasonable, arbitrary and in violation of the Labor Management Relations Act.

ISSUES PRESENTED

We will first discuss the question just referred to pertaining to the Board's refusal to dismiss the case after it

had been settled and show that the Board's conduct does not rest on any factual or rational foundation (*infra* I). While the Board touches lightly on this issue only at the end of its brief (Board Brief 41, note 17), examination of the question at the outset may be helpful for, if the Board abused its discretion—and we submit it did—if, in other words, the Board should have terminated these proceedings three years ago, then this disposes of the case without the necessity of resolving the remaining issues.

But we shall deal with the remaining issues as well in order to make clear that the Board's findings and conclusions are not supported by substantial evidence. The first of these other issues is the relatively simple one of whether the Board's conclusion that respondent's employment application form violates section 8(a)(1) is supported by the record. We will show that it clearly is not (*infra* II).

Next we will turn to the question of whether the lay-off of October 15, 1954 was discriminatory (*infra* III). We will see that far from being based on substantial evidence, the Board's conclusions run counter to it and cannot be sustained when the record is viewed in its entirety. Specifically we will see that the Board's conclusion respondent deliberately shipped out apples to another cannery in order to create a shortage by which to justify the lay-off is completely lacking in evidentiary and legal support, as are its conclusions that respondent had ample warehouse space and the lay-off was carried out discriminatorily.

We will then discuss the question of whether the Board mistakenly included a number of employees as being affected by the lay-off, even if we assume *arguendo* that it was discriminatory (*infra* IV). We will see that indeed a large number of employees was so included, among them many who were not laid off at all or who had been hired after the date

determining eligibility to vote in the election or who were concededly not union supporters.

Finally, we will discuss the three individual discharges and show that there is no substantial evidence for holding them to have been motivated by anti-union sentiments (*infra* V).

Questions pertaining to the lay-off and the discharges can be analyzed intelligently only by reviewing the extensive record; we regret that for that reason and because of the Board's intransigent position and sketchy presentation, this brief, too, will be extensive. We trust it will be helpful to the Court.

Due to the complexity of the issues we respectfully suggest that a prehearing conference in accordance with Rule 35(11) of this Court may be beneficial "to consider the simplification of the issues." Respondent would be happy to cooperate fully toward the end of such simplification.

Argument

I.

THE BOARD ARBITRARILY REFUSED TO GIVE EFFECT TO THE SETTLEMENT OF THE PARTIES

Three years ago, in March 1956, the charging union and respondent settled their dispute. They moved for permission to withdraw the charge or to dismiss the complaint (R. 185-188).

Pursuant to the settlement respondent recognized the union as the collective bargaining agent of its employees (R. 186) and agreed to place the employees who were allegedly discriminatorily discharged on a preferential hiring list (*ibid*). The union agreed to obtain waivers of back pay from the alleged discriminatees (R. 187).

Without a hearing, the Board summarily denied the motion; it refused permission to withdraw the charge and

refused to dismiss (R. 189-190). The Board did not discuss the matter other than to state the conclusion that "it does not appear that it will effectuate the policies of the Act to close the case on the basis outlined in the motion." (R. 190). The summary denial was made before the moving parties even had an opportunity to answer the General Counsel's opposition to the motion (R. 190, 195-196), although the Board was certainly in no hurry—it did not issue its decision on the merits until almost a year and a half later (R. 197-201),[1] and then again only summarily, without discussing the facts.[2]

Had the Board given reasonable effect to the settlement, this matter would have been disposed of long ago. Instead it is now before this Court almost five years since the events in question and more than three years since the parties reached a settlement, carried it out in good faith and established a continuing healthy collective bargaining relation.

The question to be decided is whether the Board acted arbitrarily in peremptorily denying the motion for permission to withdraw the charge or to dismiss. We shall show that it did.

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(1) The motion was made on March 9, 1956 and denied on April 11 (R. 188, 190). Except for this instance, the Board's processing of this case was leisurely: October 1955: hearings before trial examiner conclude (R. 17). March 1956: intermediate report of trial examiner (R. 173). August 1957: Board decision adopting trial examiner's findings and recommendations (R. 201). July 1958: Petition for enforcement (R. 208).

(2) For a recent decision where the court refused to enforce such a "per curiam" Board order, see *Osceola Co. Co-Op. Cream. Ass'n v. NLRB* (8th Cir. 1958), 251 F.2d 62. Compare *State Corp. Com'n. of Kansas v. Federal Power Com'n.* (8th Cir. 1953), 206 F.2d 690, 723, cert. denied 346 U.S. 922: "A mere assertion that the Commission has examined 'all of the available evidence of record on this subject' does not suffice to show this court, on review, that the conclusion of the Commission as to the rate of return is the result of the application of the Commission's expertise and judgment so that we would affirm."

Preliminarily, we note that the Board has wide discretion in determining whether it would accord with the policies of the Act to give effect to a settlement between the parties and to grant their request for dismissal.[3] But, of course, the Board's discretion is not unlimited. Courts will set aside exercises of discretion that are arbitrary, unreasonable or capricious.[4] And they will do so more readily where, as here, the facts pertaining to the settlement are undisputed, and the Board's conclusion is one of law.[5]

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(3) 29 USCA § 160(a); *NLRB v. E. A. Laboratories* (2nd Cir. 1951), 188 F.2d 885, 887; *NLRB v. Federal Engineering Co.* (6th Cir. 1946), 153 F.2d 233; *NLRB v. Prettyman* (6th Cir. 1941), 117 F.2d 786.

(4) Courts sometimes state this negatively by saying that a Board determination as to which it has discretion will not be set aside unless it is arbitrary, unreasonable or capricious. E.g., *NLRB v. Grace Co.* (8th Cir. 1950), 184 F.2d 126, 129; *Mueller Brass Co. v. NLRB* (D.C. Cir. 1950), 180 F.2d 402, 404; *NLRB v. Continental Oil Co.* (10th Cir. 1950), 179 F.2d 552, 554; *NLRB v. Minnesota Mining & Mfg. Co.* (8th Cir. 1950), 179 F.2d 323, 326; *Valley Mould & Iron Corp. v. NLRB* (7th Cir. 1941), 116 F.2d 760, 764; *Marlin-Rockwell Corp. v. NLRB* (2nd Cir. 1941), 116 F.2d 586, 587.

The Administrative Procedure Act, 5 USCA § 1009 (e), provides that the reviewing court "shall * * * set aside agency actions, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * *"

In *NLRB v. Prettyman,* note 3 *supra,* dealing with a settlement, the court said (117 F.2d at 792, emphasis supplied): "No evidence appears as to the terms of the settlement. *Under the facts here,* there is no abuse of the Board's discretion." In the present case the terms of the settlement appear in the record (R. 186-187) and the Board did not deign to comment on them (R. 189-190).

(5) E.g. *E. Anthony & Sons v. NLRB* (D.C. Cir. 1947), 163 F.2d 22; *NLRB v. Bell Oil & Gas Co.* (5th Cir. 1938), 98 F.2d 870; 5 USCA § 1009 (e); Jaffe, Judicial Review: *Question of Law* (1955), 69 Harv. Law Rev. 239: "The distinction between fact and law is vital to a correct appreciation of the respective roles of the administrative and the judiciary. The administrative is the sole fact finder. The judiciary may set aside a finding of fact not adequately supported by the record, but, with certain exceptions, at that point its function is exhausted. It has, as it were, a veto but no positive power of determination. On the other hand, the administrative and the judiciary *share* the role of law pronouncing and law making. They are in partnership. The court may supersede the

As we have seen the Board summarily denied the motion "because it does not appear that it will effectuate the purposes of the Act." (R. 190). To ascertain whether this brusque conclusion is arbitrary, we turn briefly to the purposes of the Act.

They are basically to promote the peaceful settlement of labor disputes and to prevent the disturbance of interstate commerce by them. As this Court said not long ago in *NLRB v. Knickerbocker Plastic Co.* (9th Cir. 1955), 218 F.2d 917, 924:

> "* * * when it is considered that the fundamental purpose of the labor Act was and is to prevent disturbance of interstate commerce by labor disputes, through employer-employee agreements arrived at by employer and employees' bargaining agent, it would seem that enforcement of the board's order should be approached with care lest the purposes of the act be hindered rather than effectuated."

In *NLRB v. Fansteel Metallurgical Corp.* (1939), 306 U.S. 240, 258, 59 S.Ct. 490, 497, the Court noted that "the purpose of the Act is to promote peaceful settlements of disputes

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administrative and itself determine the question of law; it is the senior partner."

The Board's conclusion as to what would effectuate "the purposes of the Act" is plainly one of law. Compare Jaffe, *supra*, 69 Harv. Law Rev. at 241 (emphasis supplied): "A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect. It can, for example, be made by a person who is ignorant of the applicable law. Thus a statute may provide compensation for injuries arising out of and during the course of employment. It has been found that an employee while at work has been intentionally hit on the head by a fellow employee. This is a finding of fact. It owes nothing to the compensation statute. If, however, it is asserted that the injury arose out of the employment and is therefore compensable, the assertion is something more than a finding of fact; it is, in our view, a conclusion of law. The assertion cannot be derived by one who is ignorant of the applicable statutes. It is, unless it is a purely arbitrary exercise of power, an assertion *that the purpose of the statute will be served* by awarding compensation."

by providing legal remedies for the invasion of employees' rights."[6] And in *Wallace Corporation v. NLRB* (1944), 323 U.S. 248, 253-254, 65 S.Ct. 238, 241, the Court said:

> "To prevent disputes like the one here involved, the Board has from the very beginning encouraged compromises and settlements. The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them."

In the present case the labor dispute was ended in 1956 through an agreement arrived at by the employer and the collective bargaining agent of the employees—the union that had initially brought the charges. Labor peace was restored. The Board did not find anything wrong with the agreement and there is not the slightest criticism of it in the Board's brief. The elements giving rise to the dispute—the non-recognition of the union and the alleged discriminatory discharges—have long ago been extinguished. Collective bargaining has been established; industrial strife has been ended. The contract negotiated by the parties was the first one in the history of the area (R. 194-195). For over three years now respondent and the union have bargained peacefully.[7]

In light of this, what useful purpose could conceivably be served by posting notices,[8] and offering reinstatement and back-pay to a large number of former employees? The

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(6) In accord with *Knickerbocker Plastic* and *Fansteel* see e.g., *American Communications Ass'n. v. Douds* (1950), 339 U.S. 382, 70 S. Ct. 674; *NLRB v. Fainblatt* (1939), 306 U.S. 601, 59 S. Ct. 668; *Consolidated Edison Co. v. NLRB* (1938), 305 U.S. 197, 59 S. Ct. 206; *Ohio-Alloys Corp. v. NLRB* (6th Cir. 1954), 213 F.2d 646, 649; *Inland Steel Corp. v. NLRB* (7th Cir. 1948), 170 F.2d 247, 265, aff'd. 339 U.S. 382, 70 S. Ct. 674; 29 USCA §§ 141, 151.

(7) If there is any question about that, the Board can certainly ascertain the facts with ease.

(8) It is undisputed that all employees involved have been notified (R. 192-193). Dredging this matter up before new employees can only give rise to needless questions and tensions.

Board suggested none in its order (R. 190) and it suggested none in its brief (Board Brief 41), where it attempts to brush off the entire issue in a footnote. And it is obvious that there is none.

Lacking a reasonable basis for its action, the Board contents itself with the remarkable argument that "the refusal of the Board to dismiss the instant case cannot prejudice respondent unless respondent has failed to remedy, or again commits, unfair labor practices." (*Ibid.*) Carrying out the Board's order could only threaten the industrial peace which has been achieved (R. 192, 195; again this is undisputed). Offering reinstatement to persons already placed on a preferential hiring list years ago is obviously prejudicial to respondent in terms of its personnel administration—some 146 employees are covered by the order which the Board seeks to enforce here (R. 172, 181-183, 200). And complying with the back-pay provisions would plainly be detrimental to respondent, not only because of the amount of back-pay, but also because of the expense of additional proceedings and of compution.[9]

In short, the Board cites no reasons or evidence, and not a shred of evidence appears in the record why the compelling grounds stated in support of the motion (R. 185-188, 190-195) should not be recognized and accepted. The

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(9) Again the Board does not say why or how this would carry out the policies of the Act. Its brief merely states the conclusion, without reference to any facts or reasons, that "the Board's insistence on its remedy, and its refusal to accept the private settlement, is manifestly in the public interest." (Board Brief 41). Such bald statements as to what is manifest only highlight the arbitrariness of the Board's position.

It is undisputed that back-pay was not the main interest of the employees, that their primary objectives were realized, that the number of employees in a position to collect back-pay and the amount of it is conjectural and difficult to ascertain, and that "the only objection which has been made of any kind or nature emanates from a small group of employees, who for their own political purposes within the Union and pique, seek to embarass it." (R. 191-194.)

Board's blanket refusal to do so is plainly unreasonable and capricious. "We have said that the power (of the Board) to command affirmative action is remedial, not punitive." *Republic Steel Corp. v. NLRB* (1940), 311 U.S. 7, 12, 61 S. Ct. 77, 79. Here the remedial purposes of the Act have been concededly accomplished; the Board now seeks to punish respondent by exacting retribution.[10] This the Board may not do. To quote more fully from the *Republic Steel* case, *supra* (311 U.S. at 11, 61 S. Ct. at 79):

> "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive. Consolidated Edison Company v. National Labor Relations Board, 305 U.S. 197, 235, 236, 59 S. Ct. 206, 219, 83 L.Ed. 126. See, also, National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U.S. 261, 267, 268, 58 S. Ct. 571, 574, 575, 82 L.Ed. 831, 115 A.L.R. 307. We adhere to that construction."[11]

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(10) With respect to back-pay, the inconsistency of the Board's position is shown by its statement that it acts "as a public agency safeguarding the public interest and not to further the interest of a private litigant" (Board Brief 41). Only private interests could be served by back-pay; the Board does not show or even claim that this is necessary to safeguard the public interest.

(11) In accord, e.g., *NLRB v. Virginia Electric & Power Co.* (1941), 314 U.S. 469, 477, 62 S. Ct. 344, 348 ("The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees."); *NLRB v. Braswell Motor Freight Lines* (5th Cir. 1954), 213 F.2d 208, 209 (the Board "has no authority to punish an employer for wrongful conduct.")

Accordingly, we respectively and vigorously urge that the Board's summmary refusal to give effect to the concededly fair settlement and to permit withdrawal of the charge or dismissal lacks any reasonable basis and is arbitrary and capricious.

II.

RESPONDENT'S APPLICATION FORM DOES NOT VIOLATE THE ACT

We submit that the Board's unreasonable refusal to give effect to the settlement disposes of the case. But we shall proceed to show that the record contains no substantial evidence to support the Board's conclusions that respondent had committed unfair labor practices. The principal charges against respondent concern allegedly improper lay-offs and discharges. Before we turn to them, it may be helpful to deal with the simpler matter of respondent's application form.

At the beginning of the 1955 season—that is after the discharges and after the election—respondent adopted a new form of employment application. It included the question: "To what Trade, Professional or other organizations are you a member [sic]: (Do not name any organization which would reveal your race, religion, color or ancestral origin.)" (R. 1205; Board Brief 8.) The form previously used did not call for this information. The Board concluded that job applicants would interpret this question as calling for the disclosure of union affiliation and that respondent thereby interfered with, restrained and coerced its employees in violation of section 8(a) (1) of the Act (Board Brief 8-9).

These conclusions are erroneous and unsupported by the record for several compelling reasons. *First,* the Board cites no evidence, and there is none, that this form was intended to or generally interpreted by either respondent

or job applicants as calling for the disclosure of union membership. The form was adopted when respondent was running out of its old short form and was one widely used in the industry (R. 1172-1174). Even the Board's witnesses testified that they filled out identical forms at other canneries (R. 549, 583-584).

Second, the Board refers to no evidence, and there is none, that anyone was actually "interfered with, restrained or coerced." The Board does not claim that respondent discriminated against union members in 1955 or at any time since the adoption of the new form.

Third, even if it be assumed, despite the lack of evidence, that the form sought information about union membership, it is settled that eliciting such information is not in and of itself a violation of the Act.[12] Faced with this, the Board argues that "the use of such forms in a context of intensive hostility to unions" is improper (Board Brief 27). But whatever the "context" of hostility may have been during the previous year (and we urge there was none), there is not the slightest evidence of any hostility in 1955 or thereafter, and the Board does not contend there is. On the contrary, the union and respondent had settled their dispute by early 1956; the union was and is recognized and the parties have been bargaining peacefully since then (*supra* I). Let us bear in mind that the Board's decision here is dated August 1957—long after any "context of hostility" had disappeared. At this point it is obviously absurd to deny respondent the right to use an application form which is widely used throughout the industry.

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(12) E.g. *NLRB v. McCatron* (9th Cir. 1954), 216 F.2d 212, 216, and cases there cited; *Wayside Press v. NLRB* (9th Cir. 1953), 206 F.2d 862, 864; *NLRB v. Associated Dry Goods Corp.* (2nd Cir. 1954), 209 F.2d 593, 595; *NLRB v. Mississippi Products* (5th Cir. 1954), 213 F.2d 670, 673; *NLRB v. Ozark Dam Constructors* (8th Cir. 1951), 190 F.2d 222, 227.

In further response to the Board's context-of-hostility argument, this Court has been quite specific as to when interrogation regarding union membership violates section 8(a) (1) of the Act. In *NLRB v. McCatron* (9th Cir. 1954), 216 F.2d 212, 216, the Court said:

> "We are of the opinion that in order to violate § 8(a) (1) such interrogation must either contain an express or implied threat or promise, or form part of an overall pattern whose tendency is to restrain or coerce. We so held in Wayside Press, Inc., v. N.L.R.B., 9 Cir., 1953, 206 F.2d 862. Other circuits have taken the same view. [Citations.]"

The Board has neither shown nor urged that the application form contained a threat or promise or that, at the time it was adopted or at any time since then, there has been an overall pattern whose tendency is to restrain or coerce. The form has never been put to any improper use. The Board's conclusion is plainly erroneous.

III.

THE OCTOBER 15, 1954 LAY-OFF WAS LEGAL

A. The Board's Conclusion That Respondent Shipped Apples to the Co-op to Enable it to Lay Off Union Adherents Is Not Supported by the Evidence.

1. The economic circumstances leading to the lay-off.

There is no conflict over the fact that at the time of the lay-off respondent did not have a sufficient supply of apples on hand or in prospect to continue operating two shifts (Board Brief 30). The Board contends, however, that respondent's use of the Co-op to process some apples not only brought this condition about, but "that respondent shipped the apples to the Co-op to enable it to get rid of Union supporters in advance of the election." (Board Brief

30, 31.) Whether this finding is justified is indeed, as the Board says, "the basic question on this phase of the case." (*ibid.*)

The finding is not supported by the evidence because of the following facts, largely undisputed, which we will first summarize and then review in greater detail.

(a) Use of the Co-op to process some of respondent's apples was brought about by the size and condition of the apple crop.

(b) Shipments to the Co-op started in September 1954, long before any election was scheduled. Respondent's officials began to consider the question of shipments in August, and had already made a shipment in July.

(c) Use of the Co-op, of which respondent was a member, was consistent with past practice. The amount shipped by SAGU was not excessive and was in fact only a small percentage of respondent's total crop.

(a) The size and condition of the apple crop.

(i) *The size.* There is no dispute that the 1954 crop was substantially heavier than the prior year. The Trial Examiner so found (R. 75), but he mistakenly gave the increase as 12% (*ibid*). The report of the Sonoma County Department of Agriculture which is in evidence, shows a jump from some 81,000 tons to over 103,000 tons—an increase of more than 25%.[13] The amount of apples received by respondent increased proportionately from 13,000 tons in 1953 to over 16,700 in 1954 (R. 1302, 1305).

(ii) *Condition of the crop.* Why is the question of condition important? Because, as the Trial Examiner noted, apples delivered by growers are classified as cannery apples

(13) R. 1313, 1314. With respect to R. 1314, the above figure translates boxes into tons, in accordance with note 2 on R. 1314.

or as fresh fruit; cannery apples being those which cannot be sold as fresh fruit because of their kind, size or quality (R. 75). The state of California sets standards for determining whether an apple is fit for fresh consumption (R. 1087, 1088).

Condition is further important because it affects the number of "culls". Apples classified as fresh fruit are sorted in the packing shed and unmarketable apples are culled out (R. 75). In the process of culling, the bloom which helps to preserve an apple is wiped off. Also, culls receive a certain amount of bruising. As a result they will not keep as long as apples which are immediately classified as cannery apples, without going through the packing shed (*ibid*).

Thus, the condition of the crop determines how much of it has to be canned, as well as the speed which is needed to avoid spoiling. The worse the crop, the greater is the proportion that is canned.

What was the condition of the 1954 crop? It was considerably poorer than in prior years. (R. 809-810, 831, 897-898). The season was an "unusually hard" one for grading out apples due to "extreme" cull-out from sunburn which cracked a big percentage of the apples (R. 1089). Two scorching days in June 1954 had sunburned or scalded a large part of the crop at a time when the apples were immature and not well covered by leaves (R. 1090; testimony of neutral witness). There was an excessive amount of bitter pit and fungus disease (R. 897-898). After harvesting, because of the quantity and condition of the crop and respondent's lack of additional storage facilities, there was substantial spoilage (R. 721, 821, 824, 834, 898-899, 905). There was also a great percentage of culls (R. 809-810, 898, 1089, 1091-1092). Much of the crop which would normally be packed as fresh fruit had to be canned (R. 806, 809-810, 899, 1272, 1302, 1305).

As the Trial Examiner found, while the 1954 crop was bigger than in 1953, "less than half as much of the crop of early apples was fit for sale as fresh fruit." (R. 75.)

These were the conditions facing respondent when it decided to turn to the Co-op for assistance.

(b) These conditions led to the use of the Co-op long before any election was pending.

Faced with this unusually large and poor crop, members of respondent's board of directors began in August to urge respondent's manager, Martini, to ship part of the crop to other canneries for processing so as to minimize further spoilage and to salvage as much of the crop as possible (R. 815, 831-832, 958-959). Suggesting this step were respondent's chairman of the board, the chairman of its cannery committee, and the chairman of its fresh fruit committee (*ibid*).

At first Martini felt he might be able to handle the apples himself (R. 832-833). But in September, as more apples were coming in and with the number of culls constantly increasing, he agreed with SAGU's officers and board members that the Co-op's assistance was needed (R. 833-834, 905, 958-959). Accordingly, he began shipping apples to the Co-op on September 13 and continued such shipments to October 15 (R. 905, 1309-1311).

No election had been scheduled or directed when these shipments started; the election was not ordered by the Board until October (R. 1203).

(c) Use of the Co-op, to which respondent belonged, was consistent with past practice and the amount of apples shipped to the Co-op, far from being excessive, was only a small percentage of the total.

There is no controversy over the fact that respondent had used the Co-op for processing both in the prior year

(R. 1268) and in July of 1954 (R. 902-904). The Board stresses that in 1953 shipments to the Co-op were 155 tons as against 1,358 tons in September and October 1954 (Board Brief 14, 28, R. 1268, 1298-1300, 1309-1311).

Thus, the increase in shipments to the Co-op was 1,200 tons. But, as we have noted, respondent received 3,700 tons more apples in 1954: its receipts went from 13,000 tons in 1953 to 16,700 in 1954 (R. 1302, 1305). It is obvious, therefore, that respondent absorbed the bulk of the increase itself. These undisputed figures knock the underpinning out of the Board's conclusions. For if respondent utilized the Co-op even with the 13,000 ton crop of 1953, the increased use with the much longer 1954 crop is obviously justified, particularly since the 1953 shipments to the Co-op are not attacked by the Board.

The following data, again undisputed, make the soundness of respondent's position even clearer: of the 13,000 tons of apples which respondent got in 1953, it delivered a total of 1,400 tons to driers and processors, including the Co-op (R. 1268, 1302), leaving respondent a balance of 11,600 tons. In 1954, respondent received 16,700 tons and delivered to driers and processors, including the Co-op, a total of 2,500 tons (R. 1268, 1305), leaving respondent a balance of 14,200 tons.

Thus, even with the smaller 1953 crop, respondent had needed outside assistance. In 1954, respondent handled as much of the increase as it could itself. Far from cutting production to defeat the union, it increased it. In fact, respondent itself canned 8,500 tons in 1954 (R. 1305), as against 6,500 tons in 1953 (R. 1302)—an increase of over 30%.

If anything further is needed to show the imaginary nature of the Board's "illegal diversion" contention, it is that all of the shipments to the Co-op in September and October of 1954 amounted to only 8% of the crop received by re-

spondent that year. To argue that shipping this small percentage under the crop conditions admittedly facing respondent and at a time when no election was scheduled, "can be explained only on the basis that it enabled respondent to effect a substantial layoff of Union members in advance of the election" (Board Brief 33), sweeps well beyond the realm of legal argument and into the land of fantasy.

Finally, the Board—as did the Trial Examiner—completely ignores the fact that respondent was a member of the Co-op (R. 836, 838, 934-935, 1096-1099). The Board would make it appear that respondent in sending apples to the Co-op for processing was sending them to a stranger or to a competitor. This is another and significant example of the Board ignoring the facts to bolster its theory of diversion for ulterior motives.

2. The arguments of the Board.

Against this very substantial evidence of the economic reasons for utilization of the Co-op, the Board cites the testimony of Frank Unciano. A week or so after the shipments began, Unciano allegedly asked respondent's plant superintendent Duckworth why they were sending apples to the Co-op. Duckworth supposedly answered that "he was trying to finish all the apples as fast as they could, because they were afraid the Union was going to get in there * * *" and that "he did not want to do business with the Unions, he doesn't want to sign or whatever happen * * *" (R. 516, 517). Duckworth denied having made any such statement (R. 111).

We recognize that this is not the proper forum to attack the credibility of a witness, and we make no such attack. Rather, we are constrained to note that the Trial Examiner accepted Unciano's testimony without discussion of the factors bearing on resolution of the conflict and despite serious

questions as to its credibility.[14] This is a remarkable omission since Unciano's garbled testimony stands alone in tying the Co-op shipments to any improper motive.

Except for this testimony, the Board only makes arguments which are not supported by the record:

(a) We have previously dealt with the Board's raised eyebrow over the fact that more apples were shipped to the Co-op in 1954 than in 1953. We observed this increase was small in relation to the big jump in apples received by SAGU, that SAGU handled most of the increase itself, and that SAGU's own production was substantially greater in 1954 than in 1953. The evidence shows clearly that SAGU made every effort to use its own productive capacity to the hilt in light of the crop conditions and that it succeeded in this effort.

(b) The Board argues that having the apples processed by the Co-op cost respondent more than doing it itself (Board Brief 14, 31). The only evidence cited by the Board relates to transportation costs (R. 1268); the Board refers to no testimony indicating that Co-op processing was otherwise more expensive. In this connection, intelligent discussion is not made easier by the Board's habit of making factual assertions either without any reference to the record (e.g. on page 14, where it is claimed that SAGU paid the

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(14) Duckworth related the only occasion when he talked about the Union with Unciano (R. 1108-1110). Unciano and his wife were hostile to the management: Mrs. Unciano who had been a floorlady had been reprimanded by manager Martini, and both Unciano and his wife resented it (R. 1109). Unciano came to Duckworth's home to tell him so (R. 1108-1109). While there Unciano asked Duckworth what he thought of the Union and Duckworth, in reply said that he didn't see how it could do him much good in a short seasonal industry, but that Unciano could do as he felt about it (R. 1109). This conversation was not denied by Unciano and there was no other conversation pertaining to the Union (R. 1108, 1111).

By contrast to the Trial Examiner's cursory treatment of this conflict, he analyzed many less important conflicts carefully whenever such analysis appeared to support his conclusions.

Co-op $1.58 for every case of apple sauce canned) or citing the Trial Examiner's report as evidence. The Board engages in the latter practice with particular persistency and sometimes cites only the report (e.g. on page 31 of its brief). This is not helpful to counsel or to the Court which has the task of determining whether the Trial Examiner's findings —which were adopted by the Board—are supported by substantial evidence.

Returning to the question of cost, the Board refers to no evidence showing a significant difference in processing costs. It ignores the important fact that respondent was a member of the Co-op (*supra* p. 18) and would thus participate in its profits. It further ignores the fact that respondent was faced with difficult problems due to the admittedly unusual size and condition of the apple crop.

(c) The Board argues that respondent should have finished processing the overflow by the middle or end of September (Board Brief 31). Since this curious contention fails to refer to any evidence, we will merely refer to the fact that respondent's own processing increased substantially in 1954 over 1953; its own cannery production jumped over 30% (*supra* p. 17).

Thus, against the overwhelming evidence produced by respondent there is only the statement of Unciano. Thus, the record as a whole utterly fails to support the Board's finding that the shipment of apples to the Co-op was motivated by a desire to get rid of union supporters before the election.[15]

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(15) The applicable legal principles are discussed in Section III D, *infra*. With respect to Unciano's testimony, compare *Osceola Co. Co-op Cream. Ass'n v. NLRB* (8th Cir. 1958), 251 F.2d 61, 66, 67, where the court analyzes a Trial Examiner's credibility finding, finds it of doubtful validity, and concludes that even if the anti-union statement that was testified to was made, "the record still lacks substantial evidence to support the Board's finding." (251 F.2d at 67.)

B. The Board's Conclusion With Respect to Warehouse Space Is Not Supported by the Evidence.

We have just discussed one of the main reasons for the shut-down of the night shift, namely the lack of enough apples to warrant two shifts. We saw that the Board's argument that this was caused by an illegal diversion to the Co-op is untenable.

The second reason for resumption of a single-shift operation was a lack of sufficient warehouse space to store the anticipated production of two shifts (R. 817, 818, 819, 823, 911, 912, 961, 963, 1298, 1299).

The Board on pages 32 and 33 of its brief engages in curious arithmetic to attempt to prove that enough space was available. It argues, in effect, that respondent had room for 510,000 cases of cans and had on hand less than 390,000.[16] Accepting this latter figure for sake of discussion, the former is plainly fallacious for two reasons:

First, the 510,000 case figure includes a cold storage room with a capacity of 140,000 cases (*ibid*). The Board fails to mention the fact that in 1954 this room was being used to store fresh apples (R. 815, 817, 836, 910, 913) and was thus not available for canned goods. The evidence is not only uncontradicted, but particularly credible when we recall that the 1954 apple crop was much bigger than in 1953. The Board goes well beyond the boundary of permissible argument when it says that this cold storage room "after being dried out, served as an insulated storage space for 140,000 cases" (Board Brief 33), without mentioning that the testimony which it cites for this statement refers to the year 1953 (R. 1196). This testimony is significant also because as the Board witness there points out even in 1953 the

(16) 1954 production of 495,000 cases plus carry-over of 40,000 cases less shipments of 145,000, according to Board Brief 33.

temporary conversion of the cold storage room to a canned goods warehouse was not made until December (*ibid*). Consistently, in 1954, merchandise was moved into that room in December (R. 944). But in October, as we have seen, the room contained apples.

Hence, this facility cannot be counted for storing canned goods, thus reducing the available space to 370,000 cases. Once this is done the situation confronting SAGU's management is made quite clear: with a capacity of 370,000 cases at best, room had to be found for 390,000 cases less whatever would be shipped after October 15. The Board's sleight-of-hand arithmetic backfires to show that SAGU's concern over storage room was certainly real.

Secondly, this concern becomes even more real when we consider the following undisputed facts, again wholly ignored by the Board:

(1) Canned goods should preferably be stored in insulated and heated warehouses to avoid rust damage (R. 839, 840, 912, 913, 947, 961-963);

(2) Rusted cans necessitate salvage attempts at additional cost: if the rust is not too great, the cans are cleaned with steel wool or sandpaper, causing added expense (R. 840, 841); cans that cannot be cleaned are either down graded and sold for less or—if the rust is too great—discarded altogether (R. 840, 841, 936, 961-963);

(3) While in 1954, the respondent was using whatever storage facilities it had, only one warehouse was insulated (R. 908, 839); it held 180,000 cases (R. 842, 850).

In short, insulated capacity had already been exceeded, extra capacity was being used at the risk of rust and the limits of even this extra space were being aproached. In light of this, the reduction to one shift was obviously a reasonable step. The record fully supports return to a single

shift to avoid aggravation of the storage problem; more importantly, the record entirely fails to support the Board's contrary contention, as to which it has the burden of proof (III D 1, *infra*).

C. The Board's Conclusion That the Lay-off Was Carried Out Discriminatorily Is Not Supported by the Evidence.

Turning from the substantial economic reasons which led to the discontinuance of the night shift to the manner in which the lay-off was actually carried out, we shall see that the Board ignored a wealth of substantial testimony and that its finding of discrimination is not supported by the record.

1. The decision to lay off the night shift was made before respondent knew of the election.

There is no dispute that the decision to discontinue the night shift was reached at a regular meeting of respondent's directors on October 12, 1954 (R. 850-851, 910-912, 959-961, 1298-1299; Board Brief 15). Nor is there any dispute that at that time respondent had not yet received notice of the election; the Board does not claim that respondent had such knowledge.[17] But in its brief the Board, as did the Trial Examiner, persistently ignores this because it does not fit the stress they put on the fact that the lay-off occurred shortly before the election. Respondent's ignorance of the election date contradicts the theory that the lay-off was suddenly made with the purpose of influencing the election.

In this connection, it also bears emphasis that the Board determined as eligible to vote in the election those em-

(17) In final argument on behalf of the General Counsel it was stated that notice of election was mailed to respondent on October 12, 1954, i.e. the day of the director's meeting. (See page 3647 of typed transcript on file; the argument is not in the printed record.)

ployees who were employed during the payroll period ending October 2, 1954 (R. 1203; Board Brief 16)—a date preceding the October 15 lay-off and preceding also the decision of October 12 to reduce to a one-shift operation.

In short, the time sequence is as follows:

October 2: The payroll period date fixed by the Board for determining eligibility to vote. This date was set later.

October 12: Respondent's board of directors decides to reduce to a single shift.

October 12: Board mails notice of election to respondent.

October 15: Lay-off.

October 19: Election.

2. The selection of the lay-off was not made discriminatorily.

Early in the morning of October 13, the day following the directors' meeting, manager Martini told sales manager McGuire that Friday, October 15, 1954, would be the last day for the night shift and asked McGuire to inform Duckworth, the superintendent of the cannery, to prepare a list of employees whom Duckworth and other supervisors wanted to retain (R. 851-854, 914-915). McGuire so informed Duckworth (R. 853-854) and prepared for Duckworth two lists, one of all day shift and one of all night shift employees (R. 854-855).

Duckworth called a meeting either on the afternoon of October 13 or 14, at which were present Herrerias, the night floor lady who was to become the floor lady on the single shift, and Williams, the night shift foreman (R. 762-764, 879). During the course of the meeting warehouse foreman

Aguire came in and presented a list of the employees under his supervision whom he decided should be retained. He stayed only a few minutes (R. 764, 878-880, 884-885). Doty, who was a laboratory technician and who had worked at the plant for a number of years was consulted about the length of service of some of the employees (R. 743). The selection of employees to be kept for the day shift was made on the basis of merit and in situations where there were individuals of equal merit, length of service was considered (R. 462-463, 478, 765, 774, 886). This testimony was corroborated by Doty (R. 743, 744).[18] There was no discussion as to whether any individual was a member of a labor organization or whether he was for or against any union (R. 744, 478, 886).

After the names of those to be retained had been checked off, the lists were returned to McGuire who personally typed the names on a separate sheet which he used to read at the meeting with the employeees on October 15 (R. 855-856, 858-859).

3. The Board's arguments are not based on the record.

(a) The lay-off was not sudden.

The Board in its brief argues repeatedly that the lay-off was "accelerated" or "sudden" and that it was shortly before the election. We have seen that there was nothing accelerated about it, that it was brought on by circumstances which had nothing to do with the union and that it was not motivated by any anti-union considerations.

With respect to the fact that the discontinuance of the night shift preceded the election by a few days, we saw that respondent had not been notified of the election at the time

(18) The Trial Examiner and the Board make no reference whatever to Doty's testimony.

it decided on this step and the Board does not contend to the contrary. Hence the time factor is plainly immaterial. Further, the Board has held that the time element does not *ipso facto* result in giving rise to an unfair labor practice.[19]

(b) Respondent had no knowledge of the identity of union adherents.

The Board's argument to the contrary (Board Brief 28) relies (i) on a statement attributed to Herrerias that respondent would have spies at union meetings and (ii) on testimony that Martini talked to a few employees about their union activities.

It is regrettable that space has to be taken to deal with this kind of logic. It is a long jump from Herrerias' statement about what would happen to what did happen, and the simple fact is that the Board did not find that respondent had any spies at Union meetings. The inference which counsel asks the Court to make was not made by the Board, and it was not made because there were no spies.

As concerns the alleged comments of Martini cited by the Board (Board Brief 28, 4-6), they show the opposite of any extensive knowledge: he asked two women, Pate and Lindsay what they thought about the union and had subsequent brief conversations with them (Board Brief 5); he knew Mrs. Storey was a union supporter because she identified herself as such and demanded that he meet with the union (R. 320-321); he talked to her and asked her to do him the favor of not talking about the union in the building where it would disrupt employees, but that she could talk outside the building even on the company grounds (R. 323-324); on that occasion Layman accompanied Mrs. Storey (R. 322-

(19) *Mackie-Lovejoy Mfg. Co.* (1953), 103 NLRB 172, 183 (no violation was found even though the lay-off occurred while an election was pending). And there is no requirement to give advance warning or notice of a discharge. *Osceola Co. Co-Op. Cream. Ass'n v. NLRB, supra,* 251 F.2d at 65.

323); and he answered a question of a group of women employees about the union (Board Brief 5-6). Thus, the evidence cited by the Board shows, at the most, that Martini knew of four (4) union supporters out of over two hundred employees (Board Brief 16) and as to two of the four, Storey and Layman, he did not seek such knowledge. This is obviously far from extensive familiarity of the identity of union supporters.

Finally, the Board says: "On the evening of the election Martini met Marie Tripp, who had been laid off on October 15 and sought to ascertain Tripp's attitude toward the Union by asking how the election returns suited her." (Board Brief 6.) This testimony is plainly inconsistent with the Board's claim that respondent knew who the union adherents were and discharged them discriminatorily. For if respondent had such knowledge by October 15, then why did Martini after the subsequent election seek "to ascertain Tripp's attitude toward the Union?"[20] The conversation shows, if anything, the opposite of the Board's conclusion.

(c) Employees from both shifts were selected for the lay-off.

The Board makes an issue of the fact that the crew for the single shift was selected from both day and night shifts; the Board says that in 1952 and 1953 primarily only the night shift employees were laid off (Board Brief 16-17). However, in 1954 as in the past when the night shift was discontinued, the crew for the single shift was chosen from both shifts. This was testified to both by respondent's witnesses and by witnesses called on behalf of the General Counsel (R. 253-254, 401, 725, 728).

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(20) Further, the testimony dispells any such motive on Martini's part. The conversation occurred at a filling station. Tripp was having a beer and Martini offered to buy her one. She told him some of her personal problems. He asked her how the election returns suited her—a perfectly normal question in social conversation following an election (R. 928-929).

It seems to be the theory of the Board that the proportion of those selected from both shifts for the single crew have to be the same each year. We know of no such Board policy or legal requirement. A matter of this kind is clearly one for the exercise of management's judgment. Martini, as the new manager (R. 223), had the right and obligation to make such procedural changes as he thought necessary and was not bound by whatever his predecessors may have done. If changed practices of this kind subject an employer to a risk of prosecution by the Board we have reached the point where management is no longer free to exercise its basic and necessary functions.

D. In Light of Established Legal Principles the Board's Conclusion Cannot Stand.

We embark upon a restatement of the basic principles governing judicial review of Board cases with some reluctance because of their familiarity. We feel that such a restatement will provide a useful perspective for the present case and elucidate the insubstantiality of the Board's position. These principles apply also to the individual discharges which we will discuss later.

1. The nature of the Board's burden of proof.

(a) The Board failed to establish the key elements of its claim.

In discharge cases it is settled not only that the burden of proof is on the Board, but that it must establish three elements: (a) knowledge by the employer that the employee was engaged in protected activity; (b) a discharge because he had engaged in such activity; (c) that the discharge had the effect of encouraging or discouraging membership in a labor organization. This Court said lucidly in

NLRB v. Kaiser Aluminum & Chem. Corp. (9th Cir. 1954), 217 F.2d 366, 368:

> "The charge of the complaint is that these three particular discharges were discriminatory. Discrimination relates to the state of mind of the employer. 'The relevance of the motivation of the employer in such discrimination has been consistently recognized * * *.' The General Counsel had the burden of the issue. Substantial evidence must have been adduced (1) to show the employer knew the employee was engaging in a protected activity, (2) to show that the employee was discharged because he had engaged in protected activity, and (3) to show the discharge had the effect of encouraging or discouraging membership in a labor organization. Although the Board is entitled to draw reasonable inferences from the evidence, it cannot create inferences where there is no substantial evidence upon which these may be based. Unless there is reasonable basis in the record for making of the three essential findings, the employer who is permitted to discharge 'for any reason other than union activity or agitation for collective bargaining with employees' need not justify or excuse his action."

Similarly, in the recent decision in *NLRB v. Ford Radio & Mica Corp.* (2nd Cir. 1958), 258 F.2d 457, 461, the Court says:

> "The burden is upon the General Counsel for the Board to show that the employer knew the employees were engaging in protected concerted activities and that they were discharged for engaging in such activities. N.L.R.B. v. Kaiser Aluminum & Chemical Corp., 9 Cir., 1954, 217 F. 2d 366. In addition the General Counsel must show in case of a section 8 (a) (3) violation as opposed to only a section 8 (a) (1) violation that the discharges tended to discourage or encourage membership in a labor organization. N.L.R.B. v. J. I. Case, 8 Cir., 1952, 198 F.2d 919."

The Board does not discuss these elements either as to lay-off or the three individual discharges and it is clear that they were not established. We have seen that respondent had no knowledge of the identity of union sympathizers and that the lay-off was not caused by their union sympathies or activities, if any. Further, there is no evidence whatever that the discharges had the effect of discouraging membership in the union. In fact, by the time the Trial Examiner even submitted his report respondent and the charging union settled their dispute and respondent recognized the union as the collective bargaining agent of the employees (R. 186, 188). And the bulk of the discharged employees voted in the election[21] and the Board itself dismissed the representation proceeding growing out of the election at the joint request of respondent and the union (Board Brief 6, note 8). Patently there was no adverse effect on union membership.

(b) The Board improperly attempted to shift the burden of proof to respondent.

As noted, the burden to show that the discharges were discriminatory was on the Board.[22] Yet in dealing with the economic reasons for the lay-off, the Trial Examiner and the Board act continously as if respondent had to establish the absolute necessity of the lay-off and as if the Board were free to second-guess management decisions. "I am not convinced that removal of apples * * * was dictated by a

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(21) Considering Board evidence only, there were 232 employees before the lay-off (Board Brief 16). 211 voted (R. 1202).

(22) In addition to the cases previously cited, see, e.g., *NLRB v. Standard Coil Products Co.* (1st Cir. 1955), 224 F.2d 465, 470; *NLRB v. Miami Coca-Cola Bottling Co.* (5th Cir. 1955), 222 F.2d 341; *NLRB v. Wagner Iron Works* (7th Cir. 1955), 220 F.2d 126, 133; *NLRB v. West Point Mfg. Co.* (5th Cir. 1957), 245 F.2d 783, 786.

desperate need," says the Trial Examiner in his report (R. 83). And again: "I am not convinced that the need for getting the assistance of the Co-op was as pressing as was represented, * * *" (R. 82). And again: "any management must reasonably be expected to have foreseen earlier that the warehouses would fill up" (R. 85). And again: "I am convinced that the apples in cold storage were not in *desperate* condition * * *" (R. 84). And again: "I am not persuaded that the apples shipped to the Co-op from cold storage were only such apples as could not be used up in time * * * (R. 88).

Was it respondent's duty to establish a "desperate need?" Of course not. Was it its duty to show that any management would have sent precisely the same amount of apples to the Co-op under the circumstances? Again the question answers itself. Is the Board entitled to substitute its judgment for that of management in making what is clearly management's decision? That is precisely what was done here.

The Board argues that a disproportionate lay-off of union workers leaves it to the employer to explain the discharge (Board Brief 29). Assuming that this is so, the burden does not shift to the employer to establish desperate conditions.[23] And, as we have seen, thoroughly convincing and largely uncontroverted evidence concerning the reasons for utilizing the Co-op and the available warehouse was produced.

Typical of the impossible burden placed on respondent by the Trial Examiner, as well as of his agility in leaping to invalid conclusions, is the following statement by the Trial Examiner pertaining to the crucial matter of the shipments to the Co-op (R. 89-90):

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(23) *NLRB v. Chicago Steel Foundry Co.* (7th Cir. 1944), 142 F.2d 306, 308, from which the Board quotes, points out that where "there is no evidence negativing the inference of discrimination, we cannot say that the inference thus created has been destroyed."

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> "Although it is possible to believe that good business judgment could have dictated the delivery of some apples of an overly large crop to the Co-op for processing to avoid spoilage, I cannot believe, in view of the cost invloved, that good judgment dictated the delivery of such large quantities of apples (much of which was not in danger of spoiling) to the Co-op for processing unless the Respondent had an ulterior motive."

Thus, he grudgingly admits that there may have been a need to ship some apples, but then jumps to the conclusion of an ulterior motive because of the "large quantities" of apples, "in view of the cost involved." As to cost, he cites no evidence of a significant cost differential and ignores the important fact that respondent was a member of the Co-op (*supra,* p. 18). And as concerns the "large quantities," he ignores entirely the undisputed facts that they amounted to only 8% of respondent's crop, that respondent received several thousand tons of apples more in 1954 than in 1953 and that a much larger proportion of them had to be used for canning, that even in 1953—with a smaller and better crop—respondent had shipped some apples to the Co-op, and that respondent handled the bulk of the sharp 1954 increase in deliveries itself—canning 30% more in 1954 than in 1953 and increasing its own canning production by 2,000 tons, while only 1,200 tons more were sent to the Co-op (*supra,* pp. 17, 18).

Yet in view of this the Trial Examiner and the Board could not believe that "good judgment dictated the delivery of such large quantities of apples" to the Co-op (R. 90). We submit that this is sheer ostrich-like unwillingness to see: respondent provided the strongest possible explanation for the lay-off.

2. The Board may not second-guess management.

The Trial Examiner might have sent fewer apples to the Co-op if he had been respondent's manager, although we doubt it. He apparently would have done a lot of things differently. He did not consider respondent's actions reasonable, despite the overwhelming evidence to the contrary. But in addition, he and the Board fall into the classic error of purporting to evaluate respondent's actions in terms of reasonableness. The fallacy of this has been repeatedly exposed. For instance, in *NLRB v. McGahey* (5th Cir. 1956), 233 F.2d 406, 412, the Court said:

> "The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, nought remains but antiunion purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8 (a) (3) forbids. N.L.R.B. v. Nabors, supra; N.L.R.B. v. National Paper Co., supra; N.L.R.B. v. Blue Bell, Inc., supra; N.L.R.B. v. C. & J. Camp, Inc., supra."

In *NLRB v. Wagner Iron Works* (7th Cir. 1955), 220 F.2d 126, 133, the Court similarly observed:

"Obviously, the Act does not interfere with the employer's right to conduct his business, and, in doing so, to select and discharge his employees. It proscribes the exercise of the right to hire and fire only when it is employed as a discriminatory device. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45, 57 S. Ct. 615, 81 L.Ed. 893; U.S. Steel Co. v. N.L.R.B., 7 Cir., 196 F.2d 459, 465-466. The Board may not 'substitute its judgment for that of the employer as to what is sufficient cause for discharge', N.L.R.B. v. Williamson-Dickie Mfg. Co., 5 Cir., 130 F.2d 260, 264, and discrimination may not be inferred from an employee's mere membership in a union. Indiana Metal Products Corp. v. N.L.R.B., 7 Cir., 202 F. 2d 613; N.L.R.B. v. William Davies Co., 7 Cir., 135 F.2d 179, 183, certiorari denied, 320 U.S. 770, 64 S. Ct. 82, 88 L. Ed. 460. In every case the burden is on the Board to prove that an employee's discharge resulted from his union activities. Indiana Metal Products Corp. v. N.L.R.B., supra; N.L.R.B. v. Reynolds International Pen Co., 7 Cir., 162 F.2d 680, 690."

Among many other such expressions by our courts, we will refer only to the classic one in *NLRB v. Montgomery Ward & Co., Inc.* (8th Cir. 1946), 157 F.2d 486, 490:

"* * * In considering the propriety of these discharges the question is not whether they were merited or unmerited, just or unjust, nor whether as disciplinary measures they were mild or drastic. These are matters to be determined by the management, the jurisdiction of the Board being limited to whether or not the discharges were for union activities or affiliations of the employees."

3. The Board ignores the applicable standards of judicial review.

We have already noted some of the extreme lengths to which the Board went to ignore evidence that runs counter

to its conclusions. The Board's brief reflects this approach and it is not one that either lends weight to its findings or that makes the task of this Court easier in exercising its reviewing functions.

The controlling case on the scope of review is, of course, *Universal Camera Corp. v. NLRB* (1951), 340 U.S. 474, 71 S. Ct. 456, where the Supreme Court discussed the legislative history of the Act's review provisions and called attention to public and congressional dissatisfaction with the "abdication" with which some courts granted enforcement of Board orders under the Wagner Act which provided that the Board's findings were conclusive if supported by evidence. The Court pointed out that the present standard broadens the review responsibilities of courts, although no rigid formula was established. The Court did say (340 U.S. at 490, 71 S. Ct. at 466):

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

The Court also said that Taft-Hartley "definitely precludes" courts from determining "the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence from which conflicting inferences could be drawn." (340 U.S. at 487-488, 71 S. Ct. at 464.)

Accordingly, since *Universal Camera,* courts take the view that "it is our duty to consider not only evidence tending to support the Board's findings but also evidence conflicting therewith."[24] "And if it is our duty to consider it then we must pass upon its weight."[25]

While there is no formula for ascertaining substantial evidence, certain principles have developed in addition to the one of considering the evidence on both sides:

(a) Substantial evidence must be more than suspicion.[26] Typical of suspicion is the Trial Examiner's and the Board's conclusion that respondent would not have sent as many apples as it did to the Co-op unless it had "an ulterior motive" (R. 90), and their reliance on testimony that manager Martini sometimes bantered with employees about the union (Board Brief 19).

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(24) *NLRB v. Gala-Mo Arts, Inc.* (8th Cir. 1956), 232 F.2d 102, 105; *Osceola Co. Co-op Cream. Ass'n v. NLRB* (8th Cir. 1958), 251 F.2d 62, 64; *NLRB v. Englander Company* (9th Cir. 1958), 260 F.2d 67, 70; *NLRB v. Hart Cotton Mills* (4th Cir. 1951), 190 F.2d 964, 974, 975; *NLRB v. McGahey, supra,* 233 F.2d at 413.

(25) *United Packinghouse Workers of America, CIO v. NLRB* (8th Cir. 1954), 210 F.2d 325, 330. Compare *NLRB v. West Point Mfg. Co.* (5th Cir. 1957), 245 F.2d 783, 786: "In each case it must be established whether the legal or the illegal reason for discharge was the actually motivating one, and if evidence of both is present we must ascertain whether the evidence is at least as reasonably susceptible of the inference of illegal discharge drawn by the Board as it is of the inference of legal discharge."

(26) *Universal Camera Corp. v. NLRB, supra,* 340 U.S. at 477, 71 S. Ct. at 459.

(b) The pyramiding of inferences does not constitute subtantial evidence.[27] A startling illustration of such pyramiding going to the basic issues occurs in the Trial Examiner's report at pp. 90-91. Again dealing with the utilization of the Co-op, he infers first that at the time the shipments to the Co-op began on September 13, the Co-op "could not have accepted work from the Respondent" if the peak of the harvest had not well passed—an inference made without the slightest evidence of the Co-op's facilities and production, and based on the express assumption, again without evidence, that the Co-op did not run a third shift. From this inference about the "peak of the harvest," the Examiner draws an inference that by September 13, respondent must have "pretty well" worked off the overflow of apples in its own cannery—a singular piece of logic which leaps from the "peak of the harvest" to respondent's own conditions on a given date and which ignores the wealth of positive evidence as to the actual apple problems confronting respondent (*supra* pp. 14-17).

This second inference, which rests on a number of unstated assumptions, is then used to infer that respondent "exaggerated the seriousness of the situation," which in turn leads to the nimble leap that there was a "diversion of apples to the Co-op in pursuance of an illegal object."

It is striking that this whole chain of inferences does not rest on a single piece of evidence. It begins with an assumption, not based on a single word of testimony, that the Co-op could not have accepted apples from respondent "if the peak of the harvest had not well passed."[28] It ends with the

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(27) *NLRB v. Miami Coca-Cola Bottling Co.* (5th Cir. 1955), 222 F.2d 341, 344.

(28) "Inferences must be based on evidence, direct or circumstantial, and not upon mere suspicion." *Osceola County Co-op Cream. Ass'n v. NLRB, supra,* 251 F.2d at 69.

conclusion that respondent acted in pursuance of an illegal object. Against such a process of substituting illogic for evidence a litigant is helpless indeed except for the reviewing powers of this Court.

(c) "The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as the result of such activities."[29] And, as the Court said in *NLRB v. McGahey, supra,* 233 F.2d at 413:

> "With discharge of employees a normal, lawful legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption, nor does it furnish the inference that an illegal—not a proper—motive was its cause. An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one."

(d) Finally, it is of critical importance to bear in mind that "the finding of 8 (a) (1) guilt does not automatically make a discharge an unlawful one or, by supplying a possible motive, allow the Board, without more, to conclude that the act of discharge was illegally inspired."[30] Here the Board relies heavily on the 8 (a) (1) charges to conclude that the lay-off was illegal. The two are to be kept separate: "We have frequently sustained 8 (a) (1) charges while rejecting those under 8 (a) (3)."[31]

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(29) *NLRB v. Citizen News Co.* (9th Cir. 1943), 134 F.2d 970, 974; *Osceola County Co-op Cream. Ass'n v. NLRB, supra; NLRB v. Montgomery Ward & Co., Inc., supra.*

(30) *NLRB v. McGahey, supra,* 233 F.2d at 410, and cases there cited.

(31) *Ibid.*

IV.

THE BOARD MISTAKENLY INCLUDES A LARGE NUMBER OF EMPLOYEES AS DISCRIMINATORILY LAID OFF

Assuming solely for the sake of discussion that the October 15 lay-off was discriminatory, the Board mistakenly and without evidence, let alone substantial evidence, counts a large number of employees as having been discriminatorily laid off. Many of them were not laid off at all, others who were laid off had been hired after the date determining eligibility to vote in the election, and still others were concededly not union members. The inclusion of these employees among those who are ordered reinstated with back pay is plainly erroneous.

Since the Board's brief is silent on this matter we shall briefly summarize the applicable facts. Let us recall that the lay-off occurred on Friday, October 15; the election took place on the following Wednesday, October 19.

A. Employees Not Affected by the Lay-off.

1. Ensebia (or Eusebia) Carrera.

She is one of the employees ordered reinstated with back-pay (R. 172, 182). Yet her own testimony as a witness for the Board is that her name was read on the list of those retained on October 15 (R. 1189) and that she left work because she couldn't work days (R. 1190). Similarly, the Trial Examiner shows her as being on the retention list and as being unable to work days (R. 174). Obviously there was no discharge, let alone a discriminatory one.

2. Pauline Ploxa and Dora Rawles.

Their situation is identical to Carrera's. They testified that they were on the retention list, but could not work days (R. 527, 546). Incidentally, both were union adherents (R. 176, 177); Carrera was not (R. 174).

3. Employees who continued to work after the lay-off without interruption.

The following employees worked uninterruptedly from a period preceding the lay-off until long after it; they worked the *full* week of the lay-off and the *full* week following it, i.e. the week of the election: Catherine Perry (R. 1015-1016), Edith Wilson (R. 1016-1017), Erma Bate (R. 1017-1018), Willy Augustin (R. 1022), Joe Bertoni (R. 1023), Lloyd Mills (R. 1026-1027), and Henry Narron (R. 1027-1030). Plainly, their rights were not interfered with and they suffered no loss. Even if their name was not on the retention list read on October 15 there was obviously no discrimination as to them.

Similarly, the following employees also worked continuously and worked part time in each of the two weeks: Marcia Freyling (R. 1010-1011), Rennie Napier (R. 1014-1015), Jessie W. Smith (R. 1019-1020), and Robert DeVilbiss (R. 1024-1026).

If any further corroboration of the fact that these eleven employees were not discriminatorily laid off is needed, it is found in General Counsel's Exhibit 41-E (R. 1249-1250), which lists all of the foregoing employees who were on the night shift except Bate and Narron as having been transferred to the day shift effective October 18.[32]

The relevant and undisputed data pertaining to the eleven employees we have discussed may be graphically summarized as follows:

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(32) Not on that list are Mills, Smith and DeVilbiss who were already on the day shift (R. 177, 178).

Name of Employee	First Worked Week Ending	Last Worked Week Ending	Hours Worked — Week Ending October 16	Hours Worked — Week Ending October 23	Record Reference
Catherine Perry	August 7	December 11	40	48	1015-16
Edith Wilson	July 31	December 11	40	48	1016-17
Erma Bate	July 24	December 11	32½	48	1016-18
Willy Augustin	July 24	December 11	42¼	50½	1022
Joe Bertoni	October 2	December 11	42¼	40	1023
Lloyd Mills	October 16	December 31	46	47¾	1026
Henry Narron	July 10	November 6	46½	56	1027-30
Marcia Freyling	July 24	November 20	8*	8*	1010-11
Rennie Napier	October 2	November 20	7¾*	7¾*	1012-15
Jessie W. Smith	September 25	November 27	24	24	1019-21
Robert DeVilbiss	July 24	November 6	8*	8*	1024-26

*Students who worked one day a week throughout the season.

4. Employees who quit prior to the lay-off.

(a) Employees who hadn't worked for some time prior to the lay-off.

Respondent's practice was to consider an employee who failed to come to work for a day or two as having quit (R. 981). This practice covered a number of employees who had not been working for some time prior to the lay-off on October 15 and thus were not affected by the lay-off because they had terminated their employment earlier.

Thus, Edna McCarl last worked on Friday, October 8 and did not work the whole following week; the payroll records show her terminated on October 8 (R. 982-986). She not only was not affected by the lay-off, but was rehired and worked the full week of October 23 (R. 984). Since, according to the Trial Examiner, she was a union supporter (R. 176), her reemployment is significant evidence that respondent did not discriminate against union sympathizers.

Other employees in this group are:

Susie Coats: last worked on October 12 when she became sick; was still sick on October 15; did not seek re-employment (R. 979-981; 165).

Julia Ann Row: last worked on October 6 (R. 986); there is no evidence of any kind that she ever sought re-employment. Nor did she testify to deny that she had quit.

Stella Vessels: Prior to the October 15 lay-off she last worked on October 13 (R. 990), but she was re-employed and worked 40 hours the following week (i.e. the week ending October 23) and worked continuously to the end of the season (R. 991-992). The lay-off did not affect her at all.

Edith Wasin: before the lay-off she last worked on October 11 (R. 993-994; 165); was re-employed, worked a full 48-hour week during the week following the lay-off and worked continuously to the end of the season (R. 995-996).

Ruth Albertoni: last worked on September 27 and the payroll records show her as having quit at that time (R. 996-997). There is no evidence of any kind that she ever sought re-employment. Nor did she testify to deny that she had quit.

Lyman Allman: didn't come to work on October 15 and the payroll records show him as having quit on that date (R. 1037). There was no contrary testimony by him.

With respect to the Board's contention of discrimination, the facts pertaining to these seven employees are particularly interesting. According to the Trial Examiner's report five were pro-union, two were not (R. 174 ff.). Of the three who were re-employed and worked during the week of the election—McCarl, Vessels, and Wasin—two were listed by him as pro-union and one not (R. 176, 177). There was certainly no disproportionate treatment; and the re-employment of union supporters prior to the election runs counter to respondent's alleged intention to weed out union supporters. Finally, we have seen that as concerns those who were not re-employed, there is not one iota of evidence that they ever sought to come back to work.

(b) Employees who did not complete their shift on October 15.

Following the lay-off meeting in the afternoon of October 15, most of the night-shift employees returned to work and completed their shifts (R. 1044-1068). A number did not—that is they punched out right after the meeting which took place at the start of their shift and did not work their shift at all (R. 1037-1042). These latter were regarded by respondent as having quit (*ibid;* R. 255) because they had been informed both before and after the meeting that they were to return to their jobs following the meeting (R. 892-893, 1102-1103, 1146).[33] Some of those who failed to return to work expressed the view that if they were no longer going to be working for respondent after that day they might as well quit then (R. 1104, 256).

Among the employees who quit in this manner were Breuer (R. 1037), Brott (R. 1038), Cooley (R. 1038-1039), Hance (R. 1039), Hontar (R. 1039-1040), Moriem (R. 1041), Rahm (R. 1041-1042) and Schrum (R. 1042).

It is settled that where a lay-off is announced and employees walk off afterwards without finishing their shift, they have quit without cause and their conduct is not activity proctected under the Act. *NLRB v. Jamestown Veneer & Plywood Corp.* (2nd Cir. 1952), 194 F.2d 192, 194.[34]

B. Employees Who Had Been Hired After Eligibility Date.

We may recall that the eligibility date for the election was October 2; that is, only persons employed on that date could vote (R. 1203). Six of the persons who were laid off on October 15 had not been hired until after October 2:

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(33) This is corroborated by the fact that the majority did return (R. 1044-1068).

(34) Cited with approval by this Court in *Texas Co. v. NLRB* (9th Cir. 1952), 198 F.2d 540, 543.

Name	Date of Employment	Record Reference
Virginia Azevedo	October 11	1004
Gatha Crump	October 11	1005
Gail Herrell	October 13	1006-1007
Amy Sweningson	October 4	1008
Rudolph Sweningson	October 4	1009
Lloyd Mills	October 11	1026

These employees were therefore ineligible to vote in any event. There is no basis for considering them discriminatorily laid off, since the Board's contention here is that respondent had "the purpose of affecting the results of the pending election." (E.g. Board Brief 19.) Respondent is charged with a violation of § 8 (a) (3) which makes it an unfair labor practice "for an employer by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization." (29 USCA § 158 (a) (3).) The lay-off of these employees is patently not within the terms of the Act. It is indicative of the Board's approach in this case that it treats employees who had only been employed a few days, who were ineligible to vote and who had the least seniority, as having been discriminated against.

C. Employees Who Were Not Union Sympathizers.

Approximately fifty of the employees laid off on October 15 were nonunion according to the Trial Examiner (R. 110, 174-179). As in the case of the ineligible employees, there was no discrimination against them: they obviously were not laid off because of their union activities or sympathies since concededly they had none.

Let us recall the three elements delineated by this Court in *NLRB v. Kaiser Aluminum & Chem. Corp., supra,* 217 F.2d at 368, elements which must be established to show that the discharge of an employee is discriminatory:

1. It must be shown that "the employer knew the employee was engaging in protected activity." Here, these employees were admittedly not engaged in any protected activity, so this element is not met.

2. It must be shown "that the employee was discharged because *he* had engaged in protected activity." Again, concededly none of these employees were engaged in such activity—they were not pro-union.

3. It must be shown that "the discharge had the effect of encouraging or discouraging membership in a labor organization." Nothing of the sort was shown here, or even attempted to be shown or even argued. And obviously the lay-off of these employees would not help respondent in the election.

In short, only those discriminated against because of their union sympathies or activities and not any others are entitled to relief.[35]

D. The Board's Failure to Consider the Fact That Some Employees Would Have Been Discharged in Any Event.

We have been assuming, *arguendo,* that the lay-off was carried out in a discriminatory manner. It is clear that had it been carried out nondiscriminatorily a large number of employees would still have been laid off. The Board by ordering reinstatement with back-pay for all of the employees laid off (and, as we have just seen, even for some who were not laid off) neglected to take this into consider-

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(35) E.g. *North Whittier Heights Citrus Ass'n v. NLRB* (9th Cir. 1940), 109 F.2d 76 (the employer had engaged in discriminatory rehiring practices, but only those who were not rehired because of their union activities were given relief. See 109 F.2d at 78); *NLRB v. Shedd-Brown Mfg. Co.* (7th Cir. 1954), 213 F.2d 163 (Board order partially enforced, but enforcement denied as to persons whose discharge was not due to their activities in support of the union).

ation and to make an appropriate adjustment for it. The law is settled that the Board's disregard of this matter is improper. The Court's ruling in *NLRB v. American Creosoting Co.* (5th Cir. 1943), 139 F.2d 193, 196, cert. den. 64 S. Ct. 937, is directly applicable:

> "In one aspect, however, we perceive invalidity in the Board's order. The respondent is directed to give all of its discharged men back-pay from the date of discrimination to the date of reinstatement or offer of reinstatement. But the evidence is undisputed that it has not, since the strike, employed as many men as it did before, and there is no evidence that such reduction in employment was for the purpose of discriminating against the strikers. There is, on the contrary, positive evidence that reduced employment was the result of a lack of work and the installation of labor-saving devices. It is therefore established by the record, with no reasonable inference permissible otherwise, that not all of the discharged employees would have had employment had there been no discrimination. This was recognized by the trial examiner who recommended a formula for computing payment of back-pay which would take it into account. The Board, however, disregarded his recommendation and directed the reinstatement of all employees named in schedule "A" with compensation for the period they were unemployed, without regard to whether they would have been employed for that period had there been no discrimination. This directive is clearly punitive rather than compensatory, and beyond the power of the Board to make since its functions are preventative and remedial only. It has no power to exact retribution. N.L.R.B. v. Newport News Shipbuilding & Dry Docks Co., supra."

Similarly, in *NLRB v. Carolina Mills* (4th Cir. 1951), 190 F.2d 675, 676, the court observed:

> "With respect to the back pay provision of the order, we note that the Board directed that the fact be taken

into consideration that of the employees ordered reinstated some might have been discharged if the selection had been on a nondiscriminatory basis. This is, of course, correct; and, in entering any order hereafter with regard to back pay, the Board should not award back pay on account of those employees who would have been discharged if no discrimination had been practiced, but only with respect to those who can be said to have been discriminatorily discharged."

While the Board appears to argue that there would have been no lay-off at all but for respondent's alleged illegal motive, this is not only completely unsupported by the evidence (section III, *supra*) but there would have been no basis for complaint whatever if a strictly proportional percentage of union sympathizers had been retained,[36] for then the election results would not have been affected. Accordingly, this phase of the case should be remanded to the Board, even if the Board's contention that there was discrimination is accepted.[37]

E. Recapitulation.

Recapitulating this phase of the case, the Board mistakenly counted the following employees as having been discriminatorily laid off:

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(36) The Board's statistical argument is circuitous for such proportional retention is only possible if the employer is familiar with the union views of the employees. Where he is not—as he was not here—the chances are that there will be a departure from the mathematical norm, i.e. that the lay-off will be disproportionate one way or the other. Yet from this very fact the Board argues that because of the lack of proportionality the employer must have had knowledge and an evil motive.

(37) There is precedent in this circuit for remanding a case to the Board for reconsideration. *NLRB v. Sterling Furniture Co.* (9th Cir. 1953), 202 F.2d 41, subsequent opinion 227 F.2d 521.

1. Three employees who were not laid off at all, but who themselves testified that they quit because they could not work days (A1 and A2, *supra*).

2. Employees who worked both before and after the lay-off without interruption and who were either not laid off or immediately rehired (A3, *supra*). There was plainly no discrimination against them and they incurred no damage.

3. Employees who had quit prior to the lay-off, either by their voluntary absence or by failing to work their shift on October 15 (A4, *supra*).

4. Employees who were laid off, but who were concededly ineligible to vote in the election because they had been hired after the eligibility date (*supra,* B).

5. Employees who were laid off, but who were not union sympathizers or members (*supra,* C).

V.

THE BOARD'S CONCLUSION THAT THREE INDIVIDUALS WERE DISCRIMINATORILY DISCHARGED IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Discharge of Orice Storey.

Mrs. Storey, who was discharged on September 25, 1954, is alleged to have been discriminatorily discharged because of union activity. The Trial Examiner so found (R. 133). September 25, 1954, was a Saturday, and on that day the day shift worked until noon (R. 351, 352, 1153). Mrs. Storey was on the day shift (R. 334). She told her floor-lady that she was not feeling well and that she had a headache. She was given some aspirin but still claimed after taking it that she was not well and desired to check out early (R. 1153-1154). She was given permission to do so and the evidence shows that she punched her time card at 11:24 a.m. (R. 352, 1154).

Instead of going home, Mrs. Storey remained inside the cannery in the vicinity of the time clock and engaged a number of people in conversation and stood there during working time in an area which was dangerous and in which the employees were not supposed to stand. She had a group of women around her (R. 238-240, 242, 245, 316-318, 1154-1155). Martini observed her and the group of women from the cannery balcony and asked superintendent Duckworth to find out what she was doing there (R. 316-318, 758). Duckworth inquired of Mrs. Storey's floor-lady, Edna Hardin, as to whether Mrs. Storey had clocked out (R. 761, 1155). This inquiry took place as Hardin was starting up the balcony stairs and Duckworth was coming down (R. 1155). Hardin went back down to the time clock and looked at Mrs. Storey's time card. She informed Duckworth that Mrs. Storey had clocked out (R. 1155-1156). Thereupon, Duckworth related this to Martini who ordered him to tell Mrs. Storey to leave the cannery immediately (R. 761). Duckworth did this (R. 355, 758, 761, 1156). Mrs. Storey refused to leave (R. 758, 761). Duckworth informed Martini of Mrs. Storey's refusal. Duckworth was then instructed by Martini to tell Mrs. Storey to leave and never come back, which he did (R. 317-318, 758-759, 761).

If, as the Trial Examiner found, Mrs. Storey was discriminatorily discharged, this employer certainly conducted itself in a manner not consistent with such motive. Mrs. Storey was first asked to leave. At that point she was not discharged. Had respondent intended to rid itself of her because of union activity, it could have discharged her then and there. When she refused the request of the superintendent to leave, he did not discharged her. Had he wanted to do so because of union activity he could have done so then and there. Instead, he reported her reply to

the manager, who then instructed him to discharge her. Mrs. Storey was discharged because she created an admittedly hazardous situation. We will see that the Trial Examiner chose to ignore the testimony of not merely respondent's witnesses but that of the General Counsel's witnesses who on cross-examination not only admitted it was hazardous to congregate where Mrs. Storey was, but that they were aware of a rule against gathering in that area.

Earlier that week, on September 23, 1954, at about the end of the lunch hour, Mrs. Storey had gathered a large group of women around her and proceeded into the cannery with the object of talking to Martini about meeting with the Union's representatives (R. 319-321, 345-347). When the group got into the cannery they were gathered near the clock and beyond it out into the aisle where the fork lift operated in an area admittedly dangerous when the cannery was in operation (R. 245-246, 326-330, 379-380, 403, 440-442, 587-588, 747). Upon learning that Martini was busy in the cannery office, Mrs. Storey and the group remained waiting, and when the whistle blew at 12:00 o'clock signalling the time for resumption of work by the employees, she and the group did not return to their positions but remained standing in that dangerous place near the blanching tank until Martini appeared (R. 745-748, 759-760, 1134-1138). When Martini came, Mrs. Storey demanded to know whether he would meet with the union representatives to discuss recognition and a consent election. Martini informed her that he would not do so since the matter of representation was then pending before the National Labor Relations Board (R. 245-246, 321-322, 1136-1137). At the time there were apples in the flume and the machines were running and the fork lift was operating (R. 454-455, 747, 760, 1137).

Later that afternoon, Mrs. Storey was called into the cannery office just off the balcony by Martini. He sent Duckworth for her and suggested that Duckworth see to it that another employee accompany Mrs. Storey (R. 322). The reason for requesting the presence of another employee was explained by Martini. Whenever he wanted to talk to one of the women employees he deemed it better to have another woman employee present (R. 332-333). The woman who was present was Lila Layman (R. 245, 324). There is a definite and material conflict between Mrs. Storey's version of what Martini stated and Layman's version. Layman's version corroborates Martini's. Yet the Trial Examiner completely disregarded Layman's tesitmony, although she testified as a witness for the General Counsel, was a union adherent, served on the union committee, and was also one of those who is alleged to have been discriminatorily laid off on October 15 (R. 176, 436, 437).

In this meeting on September 23, Martini told Mrs. Storey that he admired her spirit and, among other things, he told her that he did not want her engaging in solicitation on company time; that it was perfectly all right for her to do so on her own time and that she could do it on company property (R. 324). Mrs. Storey denied that Martini made such statements to her (R. 361). Layman, however, disputes Mrs. Storey and supports Martini's version (R. 444). Martini also pointed out to her that the area where she gathered the women was very dangerous and warned her against any such recurrence (R. 245). It should be noted that although Mrs. Storey said this meeting in the cannery office lasted fifty minutes, she could not recall anything more that was said than the small portion of the conversation she gave (R. 350).

As explained by Martini, Mrs. Storey was discharged because she failed to heed his warning and gathered a group

of women around her during working time in a dangerous area (R. 238, 245). That the area was dangerous and was known to be such and that the employees were not supposed to congregate there was testified to by witnesses called on behalf of the General Counsel (R. 403, 749, 758, 759). Other witnesses also so testified (R. 1132-1134). One of the witnesses for the General Counsel testified that the group had to jump out of the way of the forklift on the September 23 occasion (R. 454-455). Mrs. Storey knew the area was a dangerous one, not only because she had been told but she also daily observed the operations of the forklift (R. 379-380).

In an effort to ascribe an anti-union motive to the discharge, the Board relies on three statements assertedly made by Martini (Board Brief 12-13). We shall see that the Board failed to consider the evidence fairly and ignored pertinent evidence.

1. The incident on the Monday following her discharge.

Assertedly on that occasion Mrs. Storey asked Martini if her work had been satisfactory and he replied: "Yes, you were a good worker, but I cannot have you talking up this union thing and agitating among the other girls and forming committees." (Board Brief 13, R. 361).

One need not be experienced in labor relations or possess the perception of a clairvoyant to know the purpose for which Mrs. Storey returned to the plant on the following Monday. Knowing that she had been fired for cause, but in an effort to build a case of alleged discrimination, and working with the charging party to that end, she returned to the plant to ask Martini why she was fired. Her version of what Martini said and that given by Martini are in conflict. (R. 361, 919).

Mrs. Storey first denied that she returned to the plant at the suggestion of the union (R. 376-377). After a number of questions in an effort to elicit the truth, she finally admitted on cross-examination she was driven to the plant on that occasion by a union agent (R. 377). She didn't "recall" that after she had finished her conversation with Martini she turned around and made a sign with her fingers to this union agent which indicated that from her standpoint she had apparently gotten what she was seeking. Although admitting she had made such a sign in the past, she could not recall having done it on this occasion. She does not deny it, she merely does not recall (*ibid*). It would stretch credulity to believe Mrs. Storey's tale that her return to the plant was not as a result of a plan or suggestion worked out with the union's representatives to attempt to build an unfair labor practice case out of her discharge. All of this evidence is ignored by the Board and the Trial Examiner.

2. The incident with Clarence Storey.

Clarence Storey's testimony on a conversation with Martini at about noon on September 25, 1954 concerning the discharge of Mrs. Storey and who was present and what was said is not only disputed by Martini, Duckworth and Bondi but is inherently implausible. He testified Martini told him to go out and fire his wife (R. 569-570). Martini testified he told Mr. Storey he had fired Mrs. Storey and that if he had any more reports about him leaving his post when he should be working, he would fire him, too (R. 925). Why would Martini order Storey to fire Mrs. Storey? Was Storey a supervisor? Was his wife subject to his supervision or direction? Was he even a straw boss? The answer to these questions is that the evidence shows Storey was only a non-supervisorial employee (R. 590). He was a

dumper (R. 550). He dumped the apples from the lugs or boxes on a moving belt which carried them into the flume (R. 550, 551).

Duckworth corroborated Martini (R. 1113-1114). Bondi, Martini and Duckworth testified contrary to Clarence Storey's version, that Bondi was not present at any time during the alleged conversation (R. 1114, 970-972, 925). There is other evidence which challenges Storey's credibility. He testified that on September 23, 1954 when he was called into the cannery office for a discussion with Martini, he was on his way into the cannery to punch in at "15 minutes to 12:00" (R. 561-562). He was supposed to go back to work at that time (R. 565). He testified he did not then punch in and that he punched his time card after the noon whistle blew (R. 562, 565, 566). The noon whistle blew at 12:00 o'clock (R. 749-750, 1112-1113). His timecard shows he punched in at 11:40 a.m. on that day (R. 40, note 14).[38]

Another factor bearing on his story was his testimony that while he was in the meeting with Martini, he heard only one whistle blow and that was the twelve noon whistle signaling the end of the lunch hour (R. 564, 586). He testified that respondent always blew two whistles, one about seven minutes before the end of the lunch period and one at the end of the period (R. 564, 589). He stands alone on this. No one else, not even the General Counsel's other witnesses, ever heard of two such whistles. The evidence is that only one whistle ever blew at the noon hour signaling the end of the lunch period. The only other whistle which blew before

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(38) How does the Trial Examiner treat this discrepancy? He passes it over as of no great importance and comes to the aid of this General Counsel witness with the observation, "It is probable that Storey had finished punching in when Duckworth told him that Martini wanted to speak to him." (R. 40, note 14.) Again, we have an example of the Trial Examiner extricating a General Counsel witness from a conflict of evidence by resorting to probabilities and everything else but the evidence.

that one was the one signaling the beginning of the lunch period (R. 749-750, 1112-1113, 1116).[39]

Significantly, Mrs. Storey testified that her husband on the day of her discharge merely told her she had been fired (R. 357).[40] This supports Martini's and Duckworth's version of the conversation with Mr. Storey. If Clarence Storey's present version were true, would it not be reasonable and logical, leaving the strong words aside, that he would have told his wife Martini wanted him to fire her rather than to tell her she had been fired? It would seem that a request or order as unusual as that one would be related by a husband to his wife, particularly where both were involved. Yet, Mrs. Storey not only does not corroborate her husband but she, in fact, contradicts him.

And still another item bearing upon Clarence Storey's story was his denial on cross-examination that on the Monday following his wife's discharge when she returned to the plant to see Martini, she came to the plant with a union representative (R. 592).[41] Mrs. Storey, albeit reluctantly and only after much questioning, as we have already pointed out, admitted that she was driven to the plant by a representative of the charging party.

We have not cited all this testimony in order to ask the Court to reweigh Storey's credibility. Rather, we call attention to it in order to show how the Trial Examiner and the Board failed their duty of considering all of the evidence and resolving conflicts. We would not suggest that this Court do the work of the Board. We do urge that where the Board proceeds in such one-sided fashion, where it consistently ignores not only respondent's evidence but major inconsistencies, contradictions and untruths in the testimony

(39) The Trial Examiner ignored this evidence, too.

(40) Nothing is said about this in the Intermediate Report.

(41) Nothing is said about this in the Intermediate Report.

of its own witnesses, the Board's order is arbitrary and not entitled to enforcement. This court said quite aptly (and even before *Universal Camera*) in *NLRB v. Union Pacific Stages* (9th Cir. 1938), 99 F.2d 153, 177, a decision which is still often cited:[42]

> "It is suggested that this court should accept the findings of the Board; that contradictions, inconsistencies, and erroneous inferences are immune from criticism or attack by Section 10(e) of the Act, 49 Stat. 453, 29 U.S.C.A. § 160(e), which provides that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But the courts have not construed this language as compelling the acceptance of findings arrived at by accepting part of the evidence, and totally disregarding other convincing evidence."[43]

3. The testimony of Mounger and Schwartz.

Mounger and Schwartz testified that on the day on which Mrs. Storey was discharged they overheard Martini say in the main office of the cannery that he was "going to get rid"

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(42) E.g., *NLRB v. Knickerbocker Plastic Co.* (9th Cir. 1955), 218 F.2d 917, 922; *State of Washington v. United States* (9th Cir. 1954) 214 F.2d 33; *NLRB v. Houston Chronicle Pub. Co.* (5th Cir. 1954), 211 F.2d 848, 851; *Radio Officers' Union v. NLRB* (1954), 347 U.S. 17, 58, 74 S. Ct. 323, 345 (dissent); *Universal Camera Corp. v. NLRB* (1951), 340 U.S. 474, 486, 71 S. Ct. 456, 464.

(43) Among many similar statements, see *NLRB v. A. Sartorius & Co.* (2nd Cir. 1944), 140 F.2d 203, 205: "We are mindful of the fact that if an administrative agency ignores all the evidence given by one side in a controversy and with studied design gives credence to the testimony of the other side, the findings would be arbitrary and not in accord with the legal requirement. N. L. R. B. v. Union Pacific Stages, Inc., 9 Cir., 99 F.2d 153, 177; N.L.R.B. v. Thompson Products, Inc., 6 Cir., 97 F.2d 13, 15."

The court in that case found that the Board carefully analyzed the evidence and that it was substantial. In the present case there is no analysis by the Board and, as we have seen, the trial examiner's report, while long and argumentative, wholly fails to consider some very pertinent evidence, inconsistencies and contradictions.

of Mrs. Storey because she talked too much about the union (R. 616, 732; Board Brief 12-13). The record shows that these witnesses were badly confused and mistaken as to the alleged event.

We should recall that Mrs. Storey was discharged before the end of the day shift which on that day, a Saturday, ended at noon (R. 122, 125). She testified that after she was discharged she went to her car and waited for her husband to complete his shift (R. 125, 355-357; Board Brief 12); this occurred shortly after 11:30 (R. 356). *After* she had left, Martini allegedly told Storey to fire his wife (R. 125)—the incident we have discussed above.

The episode that Mounger and Schwartz testified to occurred still "later that day" (Board Brief 12)—at noon, according to Mounger (R. 615); "in the afternoon," after lunchtime, according to Schwartz (R. 730). Since Mrs. Storey had already been discharged by Martini, the statement attributed to him that he was "going to get rid" of her is patently implausible. Yet the Trial Examiner in crediting their testimony makes no comment whatever on this striking fact (R. 132-133).

In addition, neither of the two witnesses could give any reason for having been in the main office, which is itself inexplicable (R. 620-621, 738). One would expect that at least one of the two would know why they went in there, if they went in. When questioned by the Trial Examiner, Schwartz couldn't even remember what her working hours were on Saturday (R. 741).

A striking illustration of the Board's approach in this case is its reference to a statement by Schwartz that she asked floor-lady Edna Hardin if Storey had been discharged and why, and that Hardin replied she had and added "they couldn't have that kind of people around that talk about the union all the time." (Board Brief 13; R. 733). The Trial Examiner noted that Hardin denied making such a state-

ment (R. 133, 1159), but expressly refused to resolve the conflict, stating that it was not important to make a finding on it (R. 133). Yet in the Board's brief this incident is presented as fact, even though the Trial Examiner failed to find it to be a fact. This is representative of the manner in which the Board seeks to build a case by ignoring inconsistencies and conflicts and by carefully picking isolated bits of testimony out of the record. By some curious alchemy matters not even found by the Trial Examiner are transmuted into facts in the Board's brief.

In light of the foregoing, a dispassionate view of the record leads to the conclusion that the discharge of Mrs. Storey was for cause, that it was not discriminatory, and that the record fails to support the Board's contrary conclusion.

B. The Lay-off of Gloria Pate.

The Board claims that respondent discriminatorily discharged Gloria Pate on October 18, 1954 (Board Brief 37-39; R. 143). Pate testified that she attended the meeting on the afternoon of October 15, 1954 called for the purpose of notifying the employees of the lay-off and that her name was among those read by McGuire from the retention list (R. 708). She showed up on Monday, October 18, 1954, and was observed working on the inspection belt a few minutes after the shift began (R. 709, 887-888). Foreman Williams approached Pate and inquired as to what she was doing there since her name was not on the list and she was not supposed to be working (R. 709-710, 889). She said she had a time card and had punched in and further asserted that her name was read at the meeting on the previous Friday (*ibid*). Williams looked for a time card for her and did not find one. He then went up into the cannery office, checked the list and returned and told Pate that she was mistaken since her name was not on the retention list (R. 889-890).

She then insisted that she be paid for two hours although this was only some 10 minutes after the shift had started. Williams told her she would have to take that up with management (R. 890).

The Board and the Trial Examiner draw an unfavorable inference from the fact that respondent paid her for the two hours she demanded, arguing that this would not likely have been done if her name had not been read on the retention list on October 15 (Board Brief 38; R. 142). The amount involved was only $2.00. Respondent could have refused to pay her anything. It chose instead to be charitable. Shall it then be punished for its good deed? The Board apparently thinks so; to the Board the doing of a kindness presupposes a guilty conscience.

Highly significant is the testimony of Mr. Wilson, the accountant, that following the meeting on October 15, Pate came up to him and stated she could not understand why her name was not on the list and that she needed the job (R. 1073-1074). He told her that he knew nothing about it and that she should see superintendent Duckworth (R. 1074). No denial by Pate appears in the record.

Moreover, one of the General Counsel's own witnesses disputes Pate's testimony about her name being read at the lay-off meeting. Gloria Lindsay testified on direct examination that she heard part of a conversation between Pate and Martini on the morning of October 18, 1954 and heard Pate say (R. 672):

> "Well, I heard her asking him why she was laid off, that they didn't call her name on the 15th, and she comes back and they told her she wasn't supposed to be here, and she asked him why they didn't call her name on the 15th, and asked him if he didn't know why she wasn't called back on the 15th, and he said, 'I don't know,' just looked at her dumbfounded and shook his head, I don't know."

Since Lindsay's testimony was damaging to Pate's claim of discrimination and would make it exceedingly difficult for the Trial Examiner to find discrimination, the Trial Examiner solves the problem by stating he "disregards her (Lindsay's) testimony" (R. 136). Lindsay was Pate's friend (*ibid*), a staunch union supporter (R. 176), one of the alleged discriminatees (R. 181) and a Board witness (R. 663).

And what is this alleged discriminatory motive with respect to the incident that occurred on the morning of October 18? In an effort to bolster the General Counsel's contention, Pate was asked on direct examination if there was anything unusual about her attire that day. She testified in response thereto that on that morning she came to work wearing union buttons on her collar and cap (R. 709). This, according to General Counsel's theory, was supposed to be the motivating factor behind her alleged discharge that morning. Yet, earlier on direct and also on cross-examination, Pate testified that she was not dressed any differently that morning than she had been on October 15, or on a day or two prior thereto (R. 706-707, 716). On those occasions she was similarly attired and wore union buttons on the same places and they were as visible on those days as they were on the morning of October 18 (R. 716).[44]

We submit that Pate in her great desire to continue working took it upon herself to show up on October 18, with the hope that she might be permitted to continue on the job. There is not an iota of evidence which supports the General Counsel's claim or the Trial Examiner's finding that she was

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discharged because of union activity or that she was discharged at all on October 18, 1954. Her case cannot be differentiated from others involved in the lay-off of October 15.

C. The Discharge of Elsie Dickerson.

Mrs. Dickerson was discharged on October 25, 1954, and it is contended by the Board that she was discriminatorily discharged. The Trial Examiner so found (R. 159). This contention is based upon the theory that respondent knew she had served as a union observer at the election held about a week before her discharge and fired her because of her union sympathies.[45] Such conclusion could only be reached from an imagination run rampant and not from any evidence which finds support in the record.

Dickerson was working on the slicing machines and had done so through most of the 1954 season (R. 649). She had signed a union pledge card during the course of the season and long prior to the lay-off of the night shift (R. 626). She also wore a union button at work where it was plainly visible. This was before the lay-off (R. 628-629, 649). She was not laid off. She was retained for the single shift (R. 649).

A couple of days prior to October 25, 1954, in the afternoon, one of the trimmers requested and obtained permission from floor-lady Herrerias to exchange places with Dickerson who wanted to trim for that afternoon (R. 481). Dickerson had worked as a trimmer earlier in the season (R. 625, 649). A little later that afternoon, the first inspector on the inspection belt, Virginia Chicano, observed a number of peeled and good sized apples coming down off the

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trim belt which were rather unusual in condition (R. 1119, 479). Another inspector called as a witness by the General Counsel testified she noticed something "unusual" about the apples in the afternoon of October 25, 1954. She remembered one with holes in it and a core sticking out (R. 681). The only thing unusual this witness saw about the apples between October 19, 1954 and October 25, 1954, the date of Dickerson's discharge, were the apples she described (R. 691). These apples, in addition to having the core removed by the peeling machines, had an additional core hole in them at right angles to the normal core hole. In this second core hole there was a core which had been inserted and which was partially protruding (R. 633, 634-635, 681, 1119).

Inspector Chicano picked these apples up and placed them where they were subsequently seen by the floor-lady (R. 1120). The floor-lady took some of these apples and went behind the peeling machines from which point she could observe the trimmers. As she proceeded up the line she finally saw who was treating the apples in that fashion. It was Dickerson (R. 479-480). The floor-lady showed the apples to superintendent Duckworth and told him what she observed Dickerson doing (R. 480).

In the afternoon of the next working day, more apples treated in such fashion were observed (R. 481-482, 1118). Dickerson, without having prior permission, had exchanged places on that afternoon with a trimmer (R. 482, 632, 650-651). The floor-lady took a number of such apples and brought them again to the attention of the superintendent who instructed her to discharge Dickerson (R. 482, 681, 767, 1120). Since this was in the afternoon, the floor-lady suggested that she be permitted to wait until the end of the shift to do so (R. 482). At the end of the shift Dickerson was informed by her floor-lady that she was discharged and the reasons therefor (R. 482, 629-630). Dickerson admitted to

her floor-lady that she had mistreated apples as described and then turned to one of the employees and told her that she had just been discharged for "decorating an apple" (R. 630). She received her last pay-check some days later, on October 30 (R. 631). That Dickerson was discharged for cause and was aware of it, is supported by the fact that in her application for unemployment benefits made to the California Department of Employment, she gave as the cause of her discharge "decorating an apple" (R. 651-652), rather than listing the cause as "union sympathy" or "union activities."

Respondent's superintendent emphatically denied that Dickerson was discharged for mistreating only one apple or for union activity (R. 775). With equal emphasis he denied that he was asked to find an excuse to discharge her (*ibid*). Manager Martini did not learn of Dickerson's discharge until after it had occurred and he did not know beforehand that she was going to be discharged (R. 331, 332).

In an effort to make something out of nothing there was brought in vague, nebulous, confused and disputed testimony that on other occasions other employees had "decorated" apples and were not discharged. None of the testimony showed that the apples were perfect apples or of the size of those mistreated by Dickerson or that the apples had been treated in the manner in which Dickerson had treated them. Nor did the testimony show that any one employee had mistreated as many apples as Dickerson had or that any of them had ever re-inserted the core and sent them down the processing line. On the contrary, there was evidence adduced on cross-examination of witnesses called by the General Counsel that they never put a core in or treated an apple in the fashion that Dickerson did or ever saw anyone eslse do so (R. 368-369, 454). Chicano, the first

inspector on the inspection belt, testified that she saw at least a couple of dozen such apples on the two days in question and that she had never seen apples so treated previously nor since (R. 1119-1120). Even Mrs. Storey who was so obviously attempting to assist Dickerson and the charging party could not recall ever having seen an apple treated the way Dickerson had treated them (R. 385). The Trial Examiner makes no mention of this fact in the Intermediate Report.

The evidence showed that in the instances where other employees had decorated apples, these were generally freak apples such as undersized or oversized apples or so-called Siamese twin apples, and generally they were unpeeled (R. 644, 1143, 1146). This also is not mentioned by the Trial Examiner. In no instance was any credible evidence offered that any supervisor saw those so-called decorated apples. In fact, the witnesses produced by the General Counsel testified that the supervisors did not see such apples (R. 364, 368, 607, 690, 691). The Trial Examiner makes no mention of this evidence.

Dickerson, herself, testified that only once in a while during the time she worked for the respondent did she observe anything unusual about the apples or anything unusual in the flume, such as a glove, a real rotten apple and an apple with a ribbon on it (R. 639). The apple with the ribbon was a freak apple and Dickerson was the one who put the ribbon on it (R. 639-640, 644). When she did this she was not seen doing it nor was she heard proposing to do it by anyone representing management (R. 644). The Trial Examiner makes no mention of this. As for the glove, there was no evidence as to where it came from or how it got in the flume. It was found among unpeeled apples in the flume (R. 641). On one occasion Dickerson saw a "decorated" apple and it was an apple that had a sharp edge on it. In

other words, it was a freak apple (R. 641). The Trial Examiner does not mention this.

Ignored by him also is Dickerson's testimony that on one occasion floor-lady Hardin brought a freak apple to her and some other trimmers which Hardin had gotten down at the squirrel cage and asked whether they had put it in the water and sent it down. No one answered Hardin (R. 644). This was an attempt by Hardin to find out who was doing something she was not supposed to do. The employees knew they were not supposed to send such apples down and this is evident from their silence to Hardin's inquiry. The apple involved on that occasion was the one on which Dickerson put the ribbon without Hardin's knowledge (R. 643-644).

We submit that the contention Dickerson's discharge was motivated by her union activity is an afterthought. If, as is now asserted, she was discharged for union activity, and if she so believed, why then did she not list this on her application for unemployment benefits? She made no such contention to the California Department of Employment. Had respondent sought a pretext for discharging her, it seems logical that it would have done so on the first day that she was observed mistreating the apples. Instead, respondent, acting as any reasonable and fairminded employer would, gave her another chance. When she was discharged, it was done at the end of her shift and after she had left her post thereby saving her embarrassment in the presence of the other employees. Viewing the evidence in its totality and objectively, the conclusion is inevitable that Dickerson was discharged for cause. It is rather strange, to say the least, that Dickerson, who throughout most of the season had worked as a slicing machine operator, should have wanted to exchange jobs with a trimmer for one afternoon and that for the first time, following her appearance on the trim belt, a number of apples showed up treated in the manner hereto-

fore described. It is rather strange, too, that the second and only other occasion when this happened was when Dickerson was on the trim belt without permission.

The effect that the treatment of the apples in such fashion could have upon the quality of the respondent's product is obvious. Respondent uses as much of each apple as is usable (R. 307, 810) and by making additional holes in the apples as Dickerson did, she not only could have affected the quality of its product through the insertion of the core in such holes, but also the quantity (R. 307-309).

If discharge of an employee for such conduct as Mrs. Dickerson engaged in results in subjecting an employer to prosecution for unfair labor practices, then we have reached a point where the right of management to hire and fire for sabotage, for insubordination, for destruction of property and for incompetence or any other justifiable cause has been abolished. Dickerson does not deny having treated the apples in the manner described herein. On the contrary, she admits that she did so treat apples but attempts to minimize it by making it appear that she did it to only one apple and that what she did was no different than what others did. It is manifest that the evidence does not support her or the Board's findings.

Summary and Request for Prehearing Conference

We have discussed five principal questions:

1. **Did the Board act unreasonably or arbitrarily in refusing to dismiss the proceedings after the parties had reached a settlement in 1956?** We saw that the settlement was concededly fair, that it granted recognition to the union, established a continuing collective bargaining relation for the first time in the history of the industry, gave employment preference to the alleged discriminatees, and restored labor peace. The purposes of the Act have thus been ful-

filled. The Board's peremptory refusal to honor the request of both respondent and the charging union to permit withdrawal of the charge or to dismiss is without rational basis.

2. **Does respondent's employment application form interfere with, restrain, or coerce employees in violation of section 8(a)(1) of the Act?** We saw that it clearly does not; that there is no evidence whatever that the form was intended or interpreted as calling for disclosure of union membership or that its use caused any actual interference, restraint or coercion. We saw that it is a form widely used throughout the industry. The Board's sole reason for finding a violation of the Act was the asserted "context of hostility" against unions in the year before the adoption of the form. The Board did not endeavor to prove any such hostility at the time the form was put into use and for over three years now respondent and the union have had a continuing relation of peaceful collective bargaining. Accordingly, the Board's determination cannot be sustained.

3. **Was the lay-off of October 15, 1954, discriminatory in violation of section 8(a)(3) of the Act?** We saw that the Board's finding to that effect is not supported by the record. The Board's contention that respondent shipped apples to the Co-op in order to get rid of union supporters before the election is squarely contrary to the evidence, which shows without dispute that the shipments to the Co-op were small relative to the size and condition of the crop, that respondent's own production in 1954 was substantially larger than in 1953, that even in 1953, with a much smaller and better crop, respondent had to utilize the Co-op, that respondent was a member of the Co-op, and that shipments to the Co-op began in September long before any election was scheduled. We saw further that respondent convincingly showed that it was running out of warehouse space at the time of the lay-off and that the lay-off itself was conducted fairly and

without discrimination. The Board's conclusion rests on suspicion, on the pyramiding of implausible inferences, on a persistent disregard of important evidence, on failure to resolve significant conflicts in testimony, and on an effort to shift the burden of proof to respondent. The Board's conclusion does not rest on substantial evidence.

4. **Did the Board erroneously count a number of employees as having been discriminatorily laid off on October 15, 1954?** We saw that according to undisputed evidence the Board mistakenly included employees (a) who were not laid off at all, but were listed for retention and quit because they could not work days; (b) who worked immediately after the lay-off without interruption and who were thus either not laid off or immediately rehired; (c) who had quit prior to the lay-off; (d) who were admittedly ineligible to vote because they had been hired after the eligibility date; and (e) who were not union sympathizers or members, and thus not discriminated against.

5. **Is the Board's conclusion that three employees were discriminatorily discharged supported by substantial evidence?** We saw that the Board's findings cannot be sustained when the record is viewed as a whole and that such a view shows that Orice Storey and Elsie Dickerson were discharged for cause and clearly not for union activities, and that Gloria Pate was not discharged at all, but was included in the lay-off of October 15.

In view of the number of the issues presented by this case we respectfully request that a prehearing conference be held, in accordance with Rule 35(11) of this Court, "to consider the simplification of the issues."

We end by referring once more to the counsel of caution given by this Court in *NLRB v. Knickerbocker Plastic Co.* (9th Cir. 1955), 218 F.2d 917, 924:

"* * * when it is considered that the fundamental purpose of the labor Act was and is to prevent disturbance of interstate commerce by labor disputes, through employer-employee agreements arrived at by employer and employees' bargaining agent, it would seem that enforcement of the Board's order should be approached with care lest the purposes of the Act be hindered rather than effectuated."

We are confident that such care and a review of the record as a whole and of the applicable law will lead the Court to conclude that the Board's petition for enforcement must be denied, and we vigorously urge such denial forthwith so that this lengthy litigation may at last be brought to an end and peaceful collective bargaining between the parties continued without interference.

Dated: May 7, 1959.

Severson, Davis & Larson
Nathan R. Berke
George Brunn

By Nathan R. Berke
Attorneys for Respondent